Supreme Court, U.S.
FILED
OCT 24 1994
OFFICE OF THE CLERK

No. 94-465

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

IRVING C. AND JEANETTE E. STEVENS,
Petitioners,

v.

PETER W. STOTT, L. John Harrington, James F. Wells, Kathryn E. Kendall, Josephine W. Hatfield, Walter T. Williamson, III, Judith A. Garling, William A. Jack and Evelyn J. Jack, as Trustees of the William A. Jack Family Trust, Susan U. Rick, John M. Ulrich, Warren J. Ulrich, Jr., and Jocelyn U. Groom, as Trustee of the Separate property Trust of Jocelyn U. Groom,
Respondents.

On Writ of Certiorari To the
Oregon Court Of Appeals
Of The State of Oregon

PETITIONERS' REPLY MEMORANDUM TO RESPONDENTS' BRIEF IN OPPOSITION

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Pursuant to Supreme Court Rule 15.6, Petitioners Irving C. and Jeanette E. Stevens respectfully submit this

Reply Memorandum to Respondents' Brief in Opposition.

STATEMENT OF THE CASE

Respondent's have objected to the inclusion of Appendix F (State of Oregon form for Application and Survey of Tidelands to be deeded by the State to private owners) and Appendix G (U.S. Geological Survey Map of Cannon Beach Quadrangle).

The submission of Appendix F is a submission of a "legislative fact", as that term was coined by Professor Kenneth Davis in *"An Approach to Problems of Evidence in Administrative Process"* 55 Harv. L. Rev. 364, 404-407 (1942) and further discussed in *"Judicial Notice"* 55 Colum. L. Rev. 945 (1955) and in *"A System of Judicial Notice Based On Fairness and Convenience"* in Prospective of Law, 69 (1964). The Appendix was not submitted as an adjudicative fact, as the State form did not involve, in any way, the parties herein. The form is merely reflective of the policy of the State of Oregon relating to its placement of the boundary

between tidelands and the dry sand portion of Oregon's beaches at the ordinary high-water mark between the period of 1859 and 1935, contrary to the Court's ruling that the boundary was the upland's vegetation line.

Similarly, Appendix G (The Coast and Geodetic Survey of Cannon Beach) is a legislative fact and is only offered to illustrate the beach property in question, for whatever assistance it may give the Court.

REASONS FOR GRANTING THE WRIT

The declaration of law by the court below, that prior to 1935, Oregon's beaches' high water line, —— assumed to be the vegetation line —— was the boundary between the state owned property and the upland property was not *obiter dictum,* as argued by Respondent on page 9 in its Brief in Opposition.

The lower court's exact holding was:

> "The high-water line is significant, because, in 1910, landowners claiming under federal patents owned seaward only to the high water

> line, which is assumed to be the vegetation line. In 1935, the Supreme Court held that a federal patent conveyed title to land farther seaward, to the mean high-tide line. *State ex rel Thorton v. Hay,* 254 Or 258 4 589, 462 P2d 671 (1969); *See Borax Ltd. v. Los Angeles,* 296 U.S. 56 S Ct 23, 80 L.Ed. 9 (1935). . ." at A-4 (emphasis added)

The above statement of law elevated identical *obiter dictum* in *State ex rel Thorton v. Hay, supra,* to the law of the state, with an impact upon present and future beachfront owners as is set forth in petitioners' opening brief.

The statement of law regarding the boundary between public and private land on Oregon beaches is in direct conflict with the Supreme Court's consistent holdings on that boundary, as well as being directly contrary to Oregon's unbroken line of cases that the boundary between the state and private ownership on Oregon's beaches was the ordinary high tide land from the state's inception.

The Respondents are mistaken in contending that the lower court's ruling was consistent with or invited by

Petitioners' statement in their trial brief that:

> "Prior to 1935, title to property abutting the Pacific Ocean ran to the *high water mark Shively v. Bowlby,* 152 US 1 (1894) '. . . [By] the common law, the shore is confined to the flux and reflux of the sea at ordinary tides. *Blundell v. Catterall,* 5 Barn & A 268, 292, 106 Eng. Reprint, 1190. It is the land between ordinary high and low water mark, the land over which the daily tides ebb and flow'".
> *Borax Consolidated Ltd. v. Los Angeles,* 296 US 10, 22-23 (1935).

"High-water mark" has never referred to the vegetation line in american jurisprudence except in the State of Hawaii. *See: In re Ashford,* 50 Haw. 314, 440 P2d 76 (1968). The conflict with the Supreme Court's unbroken definition of the littoral boundary, since 1842 and *Martin v. Waddell,* 41 U.S. 16 Pet. 367 (1842), arises by the Court of Appeals placing the boundary at the vegetation line rather than at the high-water mark which is synonymous with the ordinary high tide line. *United States v. Pacheco,* 2 Wall 587, 590 (1842). That error was not invited by Petitioner.

THE INCORRECT STATEMENT OF LAW BY THE COURT BELOW

The lower court has eradicated private ownership of Oregon's beaches from the State's admission date (1859) until 1935, thereby creating a fictitious foundation for the Oregon high court's creation of recreational easement on private beach property under the English common law doctrine of ancient custom. The petition should be granted.

CONCLUSION

Finally, the change in Oregon's law was used by the lower court to deprive Petitioners of their real property, without due process of law. Further, the decision will do the same to thousands of other beach front property owners similarly situated in Oregon as already accomplished in

State ex rel Thornton v. Hay, supra, and *Stevens v. City of Cannon Beach,* 114 Or App 457, 835 P2d 9 40 (1992), 317 Or 131, 854 P2d 449 (1993) cert. den. __ U.S. ___ 114 S. Ct. 1332 (1994).

Dated October 21, 1994.

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